Supreme Court, U.S.
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No. 95-355

In the
Supreme Court of the United States
October Term, 1995

Douglass G. Lundman, as trustee
for the next of kin of Ian
Douglass Lundman, deceased,

Cross-Petitioner,

vs.

The First Church of Christ, Scientist
and James Van Horn,

Cross-Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

CROSS–PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the appellate factfinding of the lower court improperly create a higher evidentiary standard for religious organizations and their agents in violation of the Establishment Clause?

PARTIES TO THE PROCEEDING

Seven parties were defendants in the district court and appellants in the Minnesota Court of Appeals: Kathleen McKown; William McKown; Mario Tosto; Quinna Lamb; Clifton House, Inc.; The First Church of Christ, Scientist; and James Van Horn. Because the judgments against Ms. McKown, Mr. McKown, Mr. Tosto, and Ms. Lamb were sustained by the court of appeals, these parties filed the original petition for a writ of certiorari with this Court. This cross-petition is directed at Mr. Van Horn and The First Church of Christ, Scientist.

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PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

CROSS–PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioner Douglass G. Lundman respectfully petitions for a writ of certiorari to review the judgment and opinion of the Minnesota Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Minnesota Court of Appeals is reported at 503 N.W.2d 807 and is reproduced in Petitioners' Appendix to Petition for a Writ of Certiorari at 1a-64a.[1] The unpublished district court opinion is reproduced in Pet. App. at 65a-125a.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1995. On May 31, 1995, the Minnesota Supreme Court denied a petition for review. Cross-Petitioner was served with the original petition for a writ of certiorari on August 30, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, United States Constitution:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . .

STATEMENT OF THE CASE

Mr. Lundman does not controvert Petitioners' chronology of this case. He believes, however, that it will be helpful to this Court if Petitioners' statement of the case is supplemented with a more specific statement of the role played by Mr. Van Horn and

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[1] Citations for Petitioners' Appendix will hereinafter be made as "Pet. App. at --". Similarly, citations to the original petition for a writ of certiorari will be made as "Pet. at --".

The First Church of Christ, Scientist (First Church) in the death of Ian Lundman.[2]

I. BACKGROUND FACTS

On May 9, 1989, eleven-year-old Ian Lundman died of complications caused by juvenile on-set diabetes because he received Christian Science treatment in lieu of the routine medical assistance that could have easily saved his life. (T. 7/21 63.)[3]

Christian Science is a religious denomination founded by Mary Baker Eddy in 1879. *United Christian Scientists v. Christian Science Bd. of Directors*, 829 F.2d 1152, 1154 (D.C. Cir. 1987). Its basic premise is the belief that physical ailments are "errors of the mind" that can be cured through prayer. (T. 7/28 23); *see also Walker v. Superior Court*, 763 P.2d 852, 852 n.1 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989). Its followers therefore do not believe in the use of medicine to treat minor illnesses. (T. 7/23 112.) This health-care system is funded through donations, gifts and legacies from members, insurance

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[2] Besides the one-paragraph summary of the role played by Ian's mother and stepfather, the original petition for a writ of certiorari's description of Ian's suffering is limited to the following:

> [W]hen Ian's condition has not improved, Kathy [McKown] retained petitioner Mario Tosto, a Christian Science practitioner, to pray for Ian, and later obtained the services of petitioner Quinna Lamb, a Christian Science nurse, to attend to Ian's physical comfort. Despite their efforts, less than three days after his initial complaint, Ian died at home.

Pet. App. at 3.

[3] The facts pertinent to this cross-petition are cited as "(T. month/day page)". The date reference is necessary because the trial transcript is not consecutively numbered.

company payments, and Medicare and Medicaid. (T. 7/23 5; 7/27 138-39; 8/6 55-56; 8/10 300-01.)[4]

First Church, which is located in Boston, Massachusetts, is the head of this religious denomination that has established a system for providing Christian Science treatment to seriously ill children. (Ex. 45); *see also Nemark v. Williams*, 588 A.2d 1108, 1110 n.2 (Del. 1991). This treatment is provided through a national Manager of Committees on Publication (Manager), local Committees on Publication (CoP), and Christian Science nurses and practitioners.

A local CoP is actually a one-person committee who reports to the Manager. *See generally Massachusetts v. Twitchell*, 617 N.E.2d 609, 612 n.3 (Mass. 1993). CoPs, who serve as First Church's "trusted representatives," are located in every state and there are 170 such people globally. (T. 8/6 142.) The CoP's role is detailed in the *Handbook on Policies and Procedures on Publication* (CoP Handbook). This handbook instructs parents to contact their local CoP if their ill children are not improving because the CoP can "help determine a proper course of action which will protect the individual involved as well as our cause." (T. 8/9 95.) Thus, once contacted, the CoP provides treatment and legal advice over the telephone to the people directly caring for the ill child. (T. 8/9 19-21.)

First Church controls the practitioners and nurses who directly care for seriously ill children by certifying their training, by listing them in the *Christian Science Monitor*, and by encouraging members to retain only "journal-listed" nurses and practitioners. Journal-listed practitioners and nurses are thus individuals who have given evidence to First Church of their

---

[4] Petitioners make outlandish claims regarding the effectiveness of Christian Science treatment. (Pet. at 6-7.) Not only were these claims excluded at trial, they are inaccurate. Despite the fact that First Church will not report the number of children treated exclusively by Christian Science treatment, it is clear that the measles rate, for example, is very elevated among Christian Science children. (Swan Aff.)

moral character and "healing ability." (T. 8/4 20-21; 8/9 48-49.) Failure to rely exclusively ("radically") upon Christian Science treatment can cost a nurse or practitioner their journal listing. (T. 8/9 42.)

Like parents, journal-listed nurses and practitioners are instructed by First Church to contact the CoP in certain cases involving children. Practitioners then pray for the child and conduct a "healing." Nurses provide "practical care" and communicate their young patient's physical symptoms (i.e., those apparent to the human senses) to the practitioner. (T. 7/23 124.)

II. FACTS OF THIS CASE

Ian Lundman's symptoms became apparent at least four days before his death. (T. 8/5 121.) On Friday, May 5, 1989, Ian's teacher noticed Ian's lethargy and a fruity odor on his breath--both classic symptoms of diabetes. (T. 7/21 21; 8/5 121-22.). For the next two days, Ian's mother, Kathleen McKown, attempted to treat her son by, among other things, giving him breath mints to mask the persistent fruity odor. (T. 7/26 82.) Ian's condition continued to deteriorate. (7/26 82.)

By that Sunday Ms. Lundman was sufficiently concerned to terminate her own care and turn to the services of a journal-listed practitioner named Mario Tosto. (T. 7/26 84-85.) Ian (who was too young to be a member of First Church) attended Sunday school that day and later met briefly with Mr. Tosto, who gave him a prayer to recite. (T. 8/4 72, 97-99.)

Although his condition worsened considerably over the next twenty-four hours, no one asked Ian, who had earlier sought out a medical nurse at his school (T. 8/6 85), or his non-custodial father, a non-Christian Scientist who had previously provided his son with medical care (T. 7/29 72), what kind of treatment was most appropriate. (T. 7/22 100; 7/26 25, 93; 8/3 54; 8/4 97-98.) Instead, after watching her son vomit approximately five times in less than two hours on Monday morning (T. 7/26 98-99), Ms.

McKown followed the written directives of First Church and contacted James Van Horn, the Minnesota CoP. (T. 7/26 100; Ex. 45; Ex. 25.) Mr. Van Horn then informed the Manager about the seriously ill child. (T. 8/6 156-57.)

By Monday evening Ian was no longer responding to other people. (T. 7/20 164.) Ms. McKown called a Christian Science nursing service, Clifton House, Inc., and arraigned for Quinna Lamb (now Giebelhaus), a Christian Science nurse, to be dispatched to the McKowns' house. (T. 8/5 17.) Upon her arrival, Ms. Lamb was forced to place a plastic baggie on her young patient to collect his uncontrollable flow of urine. (T. 7/22 76-77.) She then reported Ian's condition to Mr. Van Horn; the third such phone call to the CoP. (T. 8/6 160-63.)

Several hours after Ms. Lamb's arrival it finally became apparent to Ian's caregivers that the Christian Science treatment was not working and that their patient was dying. (T. 7/20 134-36; T. 7/23 52-54.) But they did not call 911 until nearly thirty minutes after Ian stopped breathing. (T. 7/26 135.) One of the first officers on the scene described Ian's body as "very fragile, like he had lost weight recently, very skinny, and just basically to tell you the truth, didn't even look human." (T. 7/30 132.)

III. PROCEEDINGS BELOW

In April 1991, Mr. Lundman, as trustee of Ian's estate, commenced this wrongful death action against seven defendants: Ms. McKown, Mr. McKown, Mr. Tosto, Ms. Lamb, Clifton House, First Church, and Mr. Van Horn. Following a seven-week trial held in the summer of 1993, the jury found all of the defendants negligent and apportioned compensatory damages of $5.2 million among the parties. The same jury then awarded $9 million in punitive damages against First Church alone. The district court remitted the compensatory damages to $1.5 million. Judgment was entered on April 1, 1994. (Pet. App. at 66a.)

On appeal, in a decision filed on April 4, 1995, a split Minnesota Court of Appeals overturned the punitive damages award and held that neither Mr. Van Horn, First Church, nor Clifton House owed a duty to Ian. (Pet. App. at 60a.) The Minnesota Supreme Court denied further review. (Pet. App. at 127a.)

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS UNRESOLVED CONSTITUTIONAL QUESTIONS ABOUT THE CHRISTIAN SCIENCE TREATMENT OF CHILDREN

The question of whether the First Amendment shields religious faith healers and their church from tort liability for causing the death of a child has yet to be addressed by this Court. Indeed, this case involves the first civil jury verdict against Christian Scientist spiritual healers. As such, it raises important questions of first impression.

The conflict found in this case between religious freedom and the state's power *parens patriae* is substantial. This Court has observed that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease *or the latter to ill health or death.*" *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (citation omitted) (emphasis added). Limiting religious liberty in this manner is necessary because the protection of powerless children is a governmental interest "of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

This substantial conflict is likely to reoccur because First Church and other religious organizations holding similar beliefs are active accross the country. For example, the *Christian Science Journal* lists the names of several thousand practitioners and nurses who are engaged in approved faith healing.

Moreover, First Church is actively encouraging reliance upon its methods by electing to enjoy benefits such as federal funding from Medicare and reimbursement from private health insurance companies. *See generally* Ivy B. Dodes, Note, *"Suffer the Little Children . . ." Toward a Judicial Recognition of a Duty of Reasonable Care Owed Children by Religious Faith Healers*, 16 Hofstra L. Rev. 165 (1987).

The results of First Church's self-promotion are evident in the nation's courts. Parents have been successfully prosecuted for allowing their children to die through prayer treatment. *See, e.g., Walker v. Superior Court*, 763 P.2d 852, 873 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989). At least one other civil suit is pending against First Church and its agents for their treatment (or lack thereof) of seriously ill children. *Quigley v. First Church of Christ, Scientist*, Nos. G016980 & G017471 (Cal. Ct. App.). A decision from this Court is needed to clear the confused legal landscape surrounding the Christian Science treatment of children.

II. THE DECISION BELOW VIOLATES THE ESTABLISHMENT CLAUSE BY CREATING A HIGHER EVIDENTIARY STANDARD IN NEGLIGENCE ACTIONS AGAINST RELIGIOUSLY MOTIVATED DEFENDANTS

It is unfortunate that, as it stands now, the decision by the Minnesota Court of Appeals is the nation's leading case on the duty of a religious organization and its officials to a seriously ill child. The decision is unworthy of this status because the court engaged in improper appellate factfinding that raises the evidentiary burden of a plaintiff seeking to hold a church and its decision makers liable in a negligence action.

Courts have repeatedly recognized that the separation of church and state does not place churches "above the law" and immunize their tortuous conduct. *See, e.g., Rayburn v. General*

Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). Indeed, even the decision below pays lip service to this well-established principle. (Pet. App. at 26a.) But the decision fails to truly acknowledge the fact that lawsuits against religious tortfeasers are not to be conducted in a manner different from other civil suits. That is, when the State, through its courts, serves as the arbitrator of such a case, it must remain neutral while applying neutral principles of law. *See, e.g., Jones v. Wolf*, 443 U.S. 595, 603-04 (1979); *Christofferson v. Church of Scientology*, 644 P.2d 577, 600-03 (Or. Ct. App. 1982), *cert. denied*, 459 U.S. 1227 (1983).

The decision below is not the product of a constitutionally required neutral arbitrator; rather, the appellate court's selective reading of the record is biased in favor of the religious organization over the secular individual. The resulting creation of a higher evidentiary standard violates the neutrality guarantee of the Establishment Clause.

The Establishment Clause, which is made applicable to the States through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), is designed to "compel the State to pursue a course of neutrality toward religion." *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2497 (1994) (citation omitted). Thus, as this Court has recognized many times, the neutrality principle forecloses religious favoritism as a motivation for governmental action. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The failure of the court of appeals to exercise judicial authority in a religiously neutral manner is evident in its holdings that the punitive-damages award against First Church is unconstitutional and that Mr. Van Horn and First Church did not owe a duty to Ian Lundman.

A. The lower court's reversal of the punitive damages was the product of religious favoritism

The court of appeals gave "three independent reasons" for reversing the punitive damages imposed by the jury: lack of an agency relationship with the direct healers (discussed *infra*); unconstitutionality under the First Amendment; and a lack of evidence that First Church acted in bad faith. (Pet. App. at 22a-25a.) A close reading of the opinion, however, reveals that there were not three independent reasons; rather, the entire holding was infected by the court's First Amendment analysis. The court's official syllabus demonstrates this infection by only listing religious liberty as the reason for reversing the imposition of punitive damages. (Pet. App. at 13a-14a.)

The lower court based its First Amendment analysis on the conclusion that the award intruded too deeply into the "forbidden field of religious freedom." (Pet. App. at 24a.) But, of course, religiously based conduct is not immune from otherwise valid and neutral laws. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990); *Reynolds v. United States*, 98 U.S. 145, 147 (1878).[5] The punitive damages punished First Church's conduct. After all, the Church and its agents sought to *cure* Ian, not to *teach* him religious doctrine.

There are many things that this case is *not* about: it is not about the right of competent adults to radically rely on spiritual treatment; it is not about the right of adults to help a sick child exercise his or her own First Amendment rights (no one even asked Ian about his beliefs); it is not even a case where adults

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[5] It is worth observing that Petitioners base much of their petition for a writ of certiorari on the least restrictive means test. (Pet. at 10-20.) As a matter of federal law, however, this test only applies because of Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. Petitioners' argument is seriously undermined by the fact that a federal court recently held the Act is an unconstitutional attempt to overrule the *Smith* decision. *Flores v. City of Boerne*, 877 F. Supp. 355, 358 (W.D. Tex. 1995).

considered various medical opinions and made an informed decision in the best interest of the child. *See generally Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 280 (1990); *Newmark v. Williams*, 588 A.2d 1108, 1120 (Del. 1991). This case is only about the right of institutions and affiliated individuals to act exclusively on the basis of their own religious beliefs. Such *conduct* is undeserving of First Amendment protection or else we would allow Abraham to freely sacrifice his son Isaac as a testament to religious fealty.

As with much of the lower court's decision, improper appellate factfinding is the engine driving its holdings. The court of appeals reached the remarkable conclusion that it was "unchallenged [at trial] that all defendants, including the Church, acted in good faith." (Pet. App. at 25a.) This inaccurate determination permitted the court to conclude that there was no statutory justification for the imposition of punitive damages.

In reality, Mr. Lundman presented ample evidence from which the jury could conclude that First Church officials knowingly placed Ian in a life-threatening situation. For example, the CoP handbook, which was introduced into evidence, details how parents and other caregivers are to tell secular authorities as little as possible about an ill child's condition. Other evidence supporting the jury's conclusion that First Church acted with deliberate disregard for Ian's safety included, among other things, the fact that an agent continued to pray for Ian with the knowledge that this course of conduct foreclosed medical treatment and the fact that another agent, Mr. Van Horn, discouraged disclosing Ian's illness to the proper authorities

By ignoring this evidence the lower court was also able to ignore the applicable standard of review; namely, that a verdict should be overturned only when manifestly and palpably contrary to the evidence considered in the light most favorable to the verdict. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). This disregard for both proper appellate factfinding and the correct standard of review caused the court to surrender its

neutrality. The resulting decision favored the sectarian party over the secular one and thereby advanced religion in violation of the Establishment Clause.

B. The lower court violated the principle of religious neutrality by substituting its own interpretation of the evidence regarding the duty owed by Mr. Van Horn and First Church

The lower court improperly substituted its own factual determinations regarding the role played by Mr. Van Horn and First Church in Ian's treatment. In so doing, the court rendered the jury's verdict an empty gesture with its unauthorized *de novo* review. As the dissent observed, there was more than sufficient evidence in the record to support the jury's conclusion that Mr. Van Horn and First Church owed a duty of care to Ian. (Pet. App. at 60a-64a.)

1. Mr. Van Horn held himself out as an advisor and exercised authority over Ian's well-being

The fundamental flaw with the lower court's analysis of the role played by Mr. Van Horn is symptomatic of its larger failure to remain a neutral arbitrator; it failed to undertake a balanced examination of First Church's health care system. If it had done so, the court would have reached a conclusion that is undisputed by any of the parties: Mr. Van Horn essentially embodies the Minnesota branch of First Church. As CoP, he is the religious organization's "trusted representative" responsible for implementing its policy on healing. To these ends, he directly interacts with the Manager, local nurses and practitioners, and the parents of ill children pursuant to explicit, written policies.

The trial court was presented with these facts, along with Mr. Van Horn's conduct when Ian was seriously ill, and determined that he had assumed a duty of care toward the child

because of his "considerable power over Ian's welfare." (Pet. App. at 77a.) The court of appeals reversed this ruling by relying on a highly selective reading of the record. Among the facts improperly excluded from the court's analysis are the following:

- Mr. Van Horn was the person responsible for implementing First Church policy in Minnesota;
- As CoP, he held himself out as a legal *and* medical advisor;
- He knew from the beginning that Ian's poor health was not improving because he was contacted by Ms. McKown pursuant to First Church policy;
- He accepted the responsibility of remaining in constant contact with Ian's direct caregivers;
- He knew that by virtue of his powerful position within First Church's hierarchy that those caregivers were relying on his continuous advice; and
- He helped insulate Ian from the intervention that would have saved the child's life.

As with its analysis of the punitive damages, the lower court sabotaged the appropriate standard of review by engaging in improper appellate factfinding. The court's failure to take into account the central role of the CoP, despite the abundant evidence presented at trial by Mr. Lundman, raised the evidentiary hurdle that secular plaintiffs must clear when they initiate litigation against the conduct of religious officials. The Establishment Clause does not permit this skewing of the civil justice system in favor of religious actors.

2. The lower court ignored First Church's highly defined polices and procedures for treating children

At trial Mr. Lundman presented a great deal of evidence outlining First Church's hierarchy and its written polices regarding the treatment of seriously ill children by nurses, practitioners, and the CoP. For example, First Church certifies nurses and practitioners by listing them in the *Christian Science Journal* after they have met certain stringent requirements. Because First Church encourages its members to regain only journal-listed healers, Christian Science nurses and practitioners have no career possibilities if they are not journal-listed.

The jury examined this evidence and found by a special verdict that Mr. Van Horn, Mr. Tosto, and Ms. Lamb were agents of First Church. Such a verdict can only be set aside on appeal if it is "perverse and palpably contrary to the evidence." *Hanks v. Hubbard Broadcasting, Inc.*, 493 N.W.2d 302, 309 (Minn. Ct. App. 1992). Yet the court managed to do so by ignoring First Church's highly defined polices and procedures in favor of a vague discussion about the religious organization's freedom to espouse its beliefs. Perhaps no portion of the court's decision better illustrates its lack of impartiality than its observation that "a church is not a lawn-mower manufacturer that can be found negligent in a products liability case for failing to affix a warning sticker near the blade." (Pet. App. at 44a.)

In the final analysis, the court of appeals ignored what gives this case national significance and makes it worthy of this Court's attention. First Church is not a small religious sect; it is a multimillion dollar national organization that receives federal benefits. As such, it has developed written policies and procedures that govern how children are treated by people who rely on First Church for their livelihood. It was these polices and economic dependence that caused the Church to assume a duty to

Ian Lundman. By ignoring these facts, the lower court's decision advanced First Church at the expense of Ian.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be granted.

Dated: September 28, 1995

Respectfully submitted,

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THE FIRST CHURCH OF CHRIST, SCIENTIST and JAMES VAN HORN,
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On Petition for a Writ of Certiorari to the Minnesota Court of Appeals

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MEMORANDUM IN OPPOSITION TO THE CROSS-PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-534

DOUGLASS G. LUNDMAN, as trustee
for the next of kin of IAN
DOUGLASS LUNDMAN, deceased,
Cross-Petitioner,

v.

THE FIRST CHURCH OF CHRIST, SCIENTIST
and JAMES VAN HORN,
Cross-Respondents.

On Petition for a Writ of Certiorari to the Minnesota Court of Appeals

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MEMORANDUM IN OPPOSITION TO THE CROSS-PETITION

In a Minnesota trial court, Cross-Petitioner Douglass Lundman, as trustee for the estate of his deceased son Ian Lundman, won compensatory wrongful death damages totaling $1.5 million against several Christian Science defendants, including the cross-respondents, The First Church of Christ, Scientist ("The First Church"), located in Boston, and James Van Horn, the one-person Christian Science Committee on Publication for Minnesota. The cross-petitioner also won $9 million in punitive damages against The First Church.

The Minnesota Court of Appeals upheld only compensatory damages, and only as against four defendants other

than those who are now cross-respondents. In reviewing the issue of compensatory liability, the Minnesota Court of Appeals first considered important questions under the First Amendment and Due Process Clause and resolved those questions against the four defendants. It then applied the Minnesota common law of tort and decided the issue of compensatory liability against them under that law. These four defendants, whose compensatory liability was thereby sustained on appeal, were the persons closest to the scene during the Christian Science care that ultimately failed to save Ian Lundman's life. After the Minnesota Supreme Court denied review as to the entire case, Pet. App. 126a,[1] the four filed the principal Petition, raising issues of federal constitutional law that merit review in this Court.

Cross-petitioner has not opposed the principal Petition, which raises questions relevant only to the compensatory liability of the four petitioners. Those questions do not bear upon either the punitive damages award against The First Church, which was reversed by the Court of Appeals, or upon the compensatory liability of both cross-respondents, who successfully challenged the compensatory judgments against them on appeal.

Cross-petitioner's stratagem is thus to hope that this Court will grant the principal Petition and sweep up for review, along with it, the parts of the case cross-petitioner lost in the Court of Appeals. But there is no hope for that stratagem because, unlike the principal Petition, the Cross-Petition does not begin to satisfy elementary jurisdictional requirements of this Court. There is no jurisdiction over the Cross-Petition because, as against the cross-respondents, the judgment below "clearly and expressly" rests upon "independent" state law grounds that are "ade-

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[1] References to "Pet." and "Pet. App." are to the principal Petition filed in this case (No. 95-355, filed September 29, 1995) and to its Appendix, respectively. References to "Cross-Pet." are to the Cross-Petition.

quate" to sustain it, wholly apart from any issues of federal law cross-petitioner purports to present. *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983). In addition, the Question Presented by the Cross-Petition was neither raised nor considered in Minnesota's courts—yet another jurisdictional bar to review here.

I. INDEPENDENT AND ADEQUATE STATE GROUNDS BAR THIS COURT FROM REVIEWING THE QUESTION PRESENTED BY THE CROSS-PETITION.

Where a state law ground of decision is independent of federal law and adequate to support a judgment, this Court's "jurisdiction fails." *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935). That failure of jurisdiction is rooted in Article III's prohibition of advisory opinions:

> [O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. *Pitcairn*, 324 U.S. 117, 126 (1945). This Court has consistently obeyed that limitation on its jurisdiction, following the rule that "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan* v. *Long*, *supra*, 463 U.S. at 1041.

A. The Independent and Adequate State Law Ground for the Judgment Below as to Cross-Respondent Van Horn.

The Minnesota Court of Appeals reversed the compensatory damages verdict as to Van Horn because, as a matter of Minnesota common law, he was not liable for the death of Ian Lundman. Van Horn had no legal "duty" to Ian, given the remote relationship he had to

Ian's care. The Minnesota court held that Van Horn's "mere knowledge of [Ian's] illness" was insufficient under Minnesota's law to impose a duty of care upon him. Pet. App. 39a-40a. In so ruling, the Minnesota court cited only Minnesota case law. *Id.* Consistently, the dissenting judge, although reading the tort law of "duty" differently as applied to Van Horn, also relied upon only Minnesota law. *Id.* 60a-63a.

B. The Independent and Adequate State Law Grounds for the Judgment Below as to The First Church.

1. *Compensatory Damages*

The Minnesota Court of Appeals held that The First Church had no liability for compensatory damages either for its own conduct or, under the Minnesota law of "agency," for the conduct of others. The court found "no evidence" that The First Church "directly interfered in Ian's care," a conclusion cross-petitioner does not contest. Pet. App. 22a. The court also found "insufficient evidence as a matter of [Minnesota] law" of any relationship of control between The First Church and those who did care for Ian that otherwise could support a verdict against the Church as a principal. *Id.* In reaching this holding, the Minnesota court again cited, and relied upon, only Minnesota cases construing Minnesota law. *Id.* 43a-44a.

Cross-petitioner's attempt to argue that The First Church was sufficiently engaged with Ian's caregivers to make them the Church's agents for liability purposes is no more than an argument about what facts the record discloses and what facts Minnesota law makes relevant and sufficient to sustain "agency" findings. Even if those issues presented questions of significance beyond this case, they could not justify review in this Court. They are factual questions tightly wrapped in state law.

2. *Punitive Damages.*

As a first ground for reversing the punitive damages verdict against The First Church, the Minnesota Court concluded, as it did with respect to compensatory damages, that the Church had not, either directly or through agents, interfered in Ian's case. "Hence, there is no past conduct by the church of the kind justifying punitive damages. The punitive damage award must be reversed on that ground alone." Pet. App. 22a.

As a second independent and adequate state law ground for its punitive damages decision, the Minnesota court, without a dissenting voice, held that any such award against The First Church would violate Minnesota's punitive damages statute, Minn. Stat. § 549.20 subd. 1 (1992), and Minnesota case law interpreting it. Pet. App. 24a. The court observed that punitive damages cannot be sustained in Minnesota unless, pursuant to the statute, the record contains "clear and convincing evidence" of a "conscious or intentional disregard" of a "high probability of injury" by the defendant. *Id.* But, noting that it was "unchallenged that all defendants, including the church, acted in good faith," *id.* 25a, the Minnesota court reaffirmed that, under Minnesota law, "[g]ood faith is a proper defense to punitive damages, even though defendants might have been mistaken in their belief that a party was in jeopardy or that their actions were correct." *Peterson* v. *Sorlien*, 299 N.W.2d 123, 129 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981).[2]

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[2] The only record evidence of any connection between The First Church in Boston and Ian Lundman's treatment in Minnesota was a single phone call from Van Horn to a person at The First Church in Boston that included word that Van Horn had received a phone call from an unnamed Christian Science parent who was using spiritual care to treat a child's illness. Pet. App. 25a. But such knowledge alone, the Minnesota court held, is insufficient either to sustain damages against Van Horn or against The First Church. *Id.* 25a, 40a. In addition, observing that The First Church teaches its members to obey all laws, the Court of Appeals also noted that

Finally, as a third "independent" ground for reversing punitive damages against The First Church, the Minnesota Court of Appeals determined that even if the record had justified a finding that Ian's caregivers were "agents" of the Church under Minnesota law, and even if Minnesota's punitive damages statute had been satisfied, a punitive award still could not stand: the cross-petitioner expressly had sought a punitive recovery to deter The First Church from *espousing* spiritual treatment and from failing to train its practitioners to perform or seek medical diagnosis. Pet. App. 22a-24a. That argument, the Minnesota court held, unconstitutionally treads upon the First Amendment freedom of churches to decide what matters of faith and doctrine they will *espouse*. *Id.* There is a phalanx of support for that result under the First Amendment. See, *e.g.*, *Thomas* v. *Review Board*, 450 U.S. 707, 713 (1981); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952). But even if there were no such monolith of support in the law, the decision reversing the punitive judgment against The First Church is immune from review in this Court because the first two grounds for that decision are, in the Minnesota court's own words, "independent" grounds for its judgment and plainly adequate to support it. Pet. App. 22a, 24a.[3]

The First Church lacked the "malice required under Minnesota law for the imposition of punitive damages." *Id.* 25a.

[3] Undaunted by the express determination below that the three grounds of decision are "independent" of each other, cross-petitioner stretches in desperation for a basis to refute that. He looks to what he calls the court's "official syllabus." Cross-Pet. 10. But Minnesota's syllabus has no special status and is not "official" in the way that Ohio's is. See *Beck* v. *Ohio*, 379 U.S. 89, 93 n.2 (1964). This Court gives a syllabus no more weight than a state's own courts do, *Old Colony Trust Co.* v. *Omaha*, 230 U.S. 100, 116 (1913), and, like the petitioner in *Minnesota* v. *National Tea Co.*, the cross-petitioner has "not referred [this Court] to any Minnesota authority which, as in some states, makes the syllabi the law of the case." 309 U.S. 551, 554 (1940) (contrasting Ohio's syllabus

II. THE CROSS-PETITIONER'S FAILURE TO RAISE THE QUESTION PRESENTED BEFORE THE MINNESOTA SUPREME COURT BARS THIS COURT FROM REVIEWING IT.

Although the Cross-Petition is improperly silent on the matter, its Question Presented was not raised in the Minnesota Supreme Court.[4] The cross-petitioner nowhere explains why a question unworthy of mention in the Minnesota Supreme Court is somehow worthy of decision in this one. An "unbroken line of precedent" bars this Court from considering a constitutional question that, although available in the State Supreme Court, was not raised in or actually decided there. *Beck* v. *Washington*, 369 U.S. 541, 553 (1962); *White River Lumber Co.* v. *Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1929); see also *In re Blodgett*, 510 N.W.2d 910, 912 n.2 (Minn.), *cert. denied*, 115 S. Ct. 146 (1994).[5] The cross-petitioner could have raised the Question Presented in the Minnesota Supreme Court, and there asserted that the Minnesota Court of Appeals' alleged "appellate fact-finding" violated the Establishment Clause. Cross-Pet. i. He chose not to. That choice bars review in this Court.

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rule). Finally, nothing in this syllabus precludes the existence of three independent grounds for decision.

[4] The cross-petitioner's silence disregards Rule 14(h) of this Court's Rules, which required him "to specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts."

[5] "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional," because, without being raised in or actually decided by a state court, a constitutional right has not been "specially set up or claimed" within the meaning of 28 U.S.C. § 1257(a). *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308, 313 n.6, 334-36 (1968) (Harlan, J., dissenting on other grounds).

III. ON ITS MERITS, THE CROSS-PETITION IS UNWORTHY OF REVIEW.

Cross-Petitioner is angry at the Minnesota Court of Appeals and describes that court as so biased in favor of religion as to have decided this case by violating the Establishment Clause. So far as one can discern it, the thrust of cross-petitioner's challenge is to what he calls that court's improper "appellate factfinding." Cross-Pet. i. In a transparent attempt to wrap this plainly uncertworthy contention in a constitutional costume, cross-petitioner asserts that the Minnesota court deliberately violated the Establishment Clause by engaging in "religious favoritism" through a "highly selective reading of the record" that "sabotaged the appropriate standard of review" to reach a result "biased in favor of the religious organization over the secular individual." *Id.* 9, 12-13. According to the cross-petitioner, this Court should grant the Cross-Petition along with the principal Petition because: "the Establishment Clause does not permit this skewing of the civil justice system in favor of religious actors." *Id.* 13.

This is an odd argument, sounding more like a procedural claim under the Due Process Clause than the Establishment Clause. Nothing cited under the law of either provision, however, supports such an argument.[6] As importantly, there is nothing in the record to warrant any inference of judicial bias. The court's decision itself is proof enough, for the Minnesota Court of Appeals *affirmed* substantial jury verdicts against four Christian Science defendants on exactly the same ground as it *reversed* the verdicts against the cross-respondents—Minnesota's common law of tort duty. It is absurd to suggest that a Minnesota court that found four Christian

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[6] Moreover, the specific issue that cross-petitioner articulates—whether the Minnesota Court of Appeals applied the proper standard of review in considering the trial record below—is itself a question of Minnesota state law, and nothing more.

Science defendants civilly liable was biased in favor of religion. Pet. App. 39a.

Cross-Petitioner presents a list of "facts" that he claims the Minnesota court ignored, urging this list as evidence of the court's alleged bias. Cross-Pet. 13. This is nothing more than a desperate effort to disguise a state law case as a federal one, by purporting to divine biased motives in state court judges and then by describing their review as unconstitutionally infected by that bias. But that is a claim that could be advanced by anyone who loses a case in a state appellate court, with the plainly unacceptable result that, ultimately, every case becomes a federal case.

If the factual controversy underlying cross-petitioner's list were of the slightest interest to this Court, cross-respondents could and would vigorously contest the cross-petitioner's assertions.[7] But even if all factual disputes were resolved in cross-petitioner's favor, there would remain only the same question of "duty" under Minnesota tort law to be decided on a different set of facts. Again, no issue worthy of this Court's attention would present itself. See Sup. Ct. R. 10.

In any event, the cross-respondent's charge of pro-religion bias on the part of the Minnesota Court of Appeals is particularly ironic in view of the million dollar compensatory verdict that court sustained against four Christian Scientists who, in complete good faith, treated a child's illness as they thought best for him in accord with the tenets of their religion.

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[7] It is telling that cross-petitioner fails to provide a single citation to the trial record to support his list of so-called omitted facts. To take just one example, cross-petitioner makes the preposterous assertion that Van Horn, the one-person Committee on Publication for Christian Science in Minnesota, held himself out as a "medical" advisor! Cross-Pet. 13. As the Court below determined, Van Horn had two distinct responsibilities: (1) to correct public error as to Christian Science and (2) to consult with Christian Scientists as to their legal rights and obligations. Pet. App. 39a.

CONCLUSION

As the cross-petitioner has observed, this case is of "national significance." Cross-Pet. 14. Accordingly, cross-respondents join cross-petitioner in supporting the principal Petition. But the Cross-Petition has no such national import. It presents only factual disputes and independent state grounds for decision and, thus, should be denied.

Respectfully submitted,

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